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In the Supreme Court of the United States

EMMA RODRIGUEZ, PETITIONER

v.

PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, *ET AL.*, RESPONDENTS

UNITED STATES OF AMERICA, INTERVENOR

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that Puerto Rico, like the States, cannot be sued for damages under the Fair Labor Standards Act, where the States are immune from suit under the Act, the Act defines "State" to include territories such as Puerto Rico, and the Puerto Rican Federal Relations Act commands that "[t]he statutory laws of the United States * * * shall have the same force and effect in Puerto Rico as in the United States."

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INTRODUCTION

The only question decided by the Court of Appeals was whether Puerto Rico, unlike the fifty States, can be sued for damages under the Fair Labor Standards Act ("FLSA") despite the clear directive in the Puerto Rican Federal Relations Act ("PRFRA") that "[t]he statutory laws of the United States * * * shall have the same force and effect in Puerto Rico as in the United States." The court below correctly determined, as a matter of statutory interpretation, that Puerto Rico is no more subject to FLSA damages suits than are the States. That conclusion is fully consistent with this Court's decisions, and there is no circuit conflict on this issue. Indeed, the only other circuit to address it—the First Circuit—has consistently ruled the same way.

STATEMENT

1. The Puerto Rico Federal Affairs Administration ("PRFAA") is an executive agency of the Commonwealth of Puerto Rico. Petitioner was employed by the PRFAA in its voter registration project in New York, New York. Petitioner sued the PRFAA in the district court, claiming that the PRFAA violated the FLSA by (1) failing to pay her for all the hours she worked; (2) failing to pay her overtime wages; and (3) firing her when she complained about these violations. The PRFAA moved to dismiss petitioner's complaint on the ground that the PRFAA, as an agency of the Commonwealth of Puerto Rico, has sovereign immunity from a private suit for damages under the FLSA.

Section 16(b) of the FLSA provides that "[a]n action to recover" for violations of the FLSA "may be maintained against any employer (including a public agency) * * * by any one or more employees" (29 U.S.C. § 216(b)), and the statute further defines "public agency" to include "the government of a State" and "any agency of * * * a State" (*id.* § 203(x)). The term "State" means "any State of the

United States or the District of Columbia or any Territory or possession of the United States." *Id.* § 203(c).

Although Section 16(b) of the FLSA purports to allow a suit against a State, this Court held in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), that Article I of the Constitution does not empower Congress to abrogate the States' sovereign immunity from suit in federal court. Three years later, the Court in *Alden* v. *Maine*, 527 U.S. 706 (1999), applied the same rule in a case involving a claim brought in state court pursuant to Section 16(b) of the FLSA. Thus, whatever Congress intended to permit in Section 16(b), this Court foreclosed the possibility of a private action for damages against a State. As the Court of Appeals noted, "*Seminole Tribe* and *Alden* mean that state employees no longer have any 'court of competent jurisdiction' in which to sue their employers for FLSA violations." Pet. App. 5a-6a (citation omitted).

2. The district court rejected the PRFAA's sovereign immunity defense, holding that Puerto Rico—unlike the States—has no immunity from private actions for damages under the FLSA. The court recognized that "virtually every court that has addressed the issue"—including the First Circuit—"has found Puerto Rico immune from suit in parallel with the states." Pet. App. 15a-16a. Nevertheless, the court concluded that "Puerto Rico cannot be said to have constitutional sovereign immunity" because it is "a territory, and not a state." Pet. App. 18a. And since Puerto Rico's sovereign immunity did not have the same origin as the States' sovereign immunity, the district court concluded that "there is no reason to assume that whatever sovereign immunity [Puerto Rico] might possess is parallel to that of the states or that it is not subject to Congressional restriction under the Territory Clause." *Ibid.*

The district court then held that Congress had validly abrogated Puerto Rico's sovereign immunity when it amended the FLSA to permit private actions against

"public agencies," including the government of Puerto Rico. See Pet. App. 17a. Although this Court in *Seminole Tribe* and *Alden* had invalidated Section 16(b) as it applied against the States, the district court held that the offending provisions of the statute were severable, such that Section 16(b) could continue to operate against Puerto Rico. See Pet. App. 20a-21a.

The district court certified its decision for interlocutory appeal under 28 U.S.C. § 1292(b), and the Court of Appeals granted permission to appeal. The United States intervened to defend the constitutionality of Section 16(b) as applied to Puerto Rico.[1]

3. The Court of Appeals reversed. Rather than address the question (presented in briefs and at oral argument) whether Puerto Rico has *constitutional* sovereign immunity, the court rested its decision solely on the PRFRA, which provides that "[t]he statutory laws of the United States * * * shall have the same force and effect in Puerto Rico as in the United States." 48 U.S.C. § 734. As the court noted, this command of equal treatment "has defined the application of federal law to Puerto Rico since 1900." Pet. App. 4a.

The question, then, was what "force and effect" Section 16(b) of the FLSA could be given in Puerto Rico consistent with the command of Section 734 of the PRFRA. It was not enough to say that Congress intended Section 16(b) to operate against the States and Puerto Rico, for this Court had already invalidated the statute as it applied to the States. As the Court of Appeals explained, "[a]fter *Seminole Tribe* and *Alden*, section 16(b) no longer has the

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[1] The United States "expresse[d] no view regarding the statutory issue presented by the Federal Affairs Administration," but argued only that Congress has the power under the Constitution to subject Puerto Rico to suit by private parties for violations of the FLSA. Br. for the United States as Intervenor at 11.

force and effect Congress purported to give it: States now enjoy immunity from private rights of action." Pet App. 9a-10a. And since the States could not be sued under Section 16(b), that provision had no "force" or "effect" in the United States.

Contrary to petitioner's assertion, it required no great imagination to determine whether Congress intended to apply Section 16(b) to Puerto Rico when that provision could not apply to the States. "FRA section 734, though originally enacted almost a century before *Seminole Tribe* and *Alden*, tells us exactly how to apply section 16(b) to Puerto Rico now that, by virtue of those two decisions, its private right of action has become inapplicable to States." Pet. App. 8a. Section 734 commands equal treatment, and "[t]he only way to give section 16(b) 'the same force and effect in Puerto Rico as in the United States' is to hold, * * * that Puerto Rico likewise enjoys immunity from private FLSA enforcement suits." *Ibid.*

REASONS FOR DENYING THE PETITION

Contrary to petitioner's arguments, the decision below was a straightforward and correct application of the PRFRA. It is fully consistent with this Court's decisions. And it does not conflict with decisions in any other circuit; indeed, adoption of petitioners' argument would have placed the court below in square conflict with longstanding holdings of the First Circuit.

I. The Court of Appeals Correctly Decided That The Federal Relations Act Requires Equal Treatment Of Puerto Rico And The States.

From the earliest stages of its relationship with Puerto Rico, Congress has provided that federal statutes must have the same force and effect in Puerto Rico as in the States. The Court of Appeals properly applied this default rule of equal treatment to conclude that Puerto Rico, like the States, cannot be sued for damages under Section 16(b) of the FLSA.

1. From 1899 to 1950, Congress steadily granted an increasing measure of autonomy to the people of Puerto Rico, and this Court consistently acknowledged the unique position of Puerto Rico among American territories. In 1899, Congress ratified the Treaty of Paris, which formally concluded the Spanish-American War and ceded the island of Puerto Rico and other Spanish possessions to the United States. See 30 Stat. 1754 (1899). The treaty provided that "[t]he civil rights and political status of the native inhabitants" of Puerto Rico and the ceded territories "shall be determined by the Congress." 30 Stat. 1759.

To govern its new relationship with Puerto Rico, Congress enacted the Foraker Act, 31 Stat. 77 (1900). The Foraker Act recognized a political entity known as the "People of Porto Rico," but did not recognize the inhabitants of Puerto Rico as United States citizens or provide any sort of self-government. 31 Stat. 79. The Act vested executive authority in a governor and top department chiefs appointed by the President. See 31 Stat. 81. Local legislative authority was assigned to an assembly consisting of an executive council appointed by the President and a house of delegates elected by popular vote. See 31 Stat. 82. The Act required that "[a]ll laws enacted by the legislative assembly shall be reported to the Congress of the United States," which reserved the right, "if deemed advisable, to annul the same." 31 Stat. 83. The justices of the Supreme Court of Puerto Rico were appointed by the President with the consent of the Senate, while the judges of inferior courts were appointed by the governor with the consent of his executive council. See 31 Stat. 84.

Most important here, Section 14 of the Foraker Act provided that "the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws." 31 Stat. 80.

This Court soon acknowledged that the Foraker Act created "a completely organized Territory" in Puerto Rico. *New York ex rel. Kopel* v. *Bingham*, 211 U.S. 468, 476 (1909). And in 1913, the Court in *People of Porto Rico* v. *Manuel Rosaly y Castillo*, 227 U.S. 270 (1913), held that the government of Puerto Rico could not be sued without its consent. Even in 1913, it was "not open to controversy that, aside from the existence of some exception, the government which the [Foraker Act] established in Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent." *Id.* at 273.

Congress later enacted the Jones Act, 39 Stat. 951 (1917), which granted United States citizenship to all the inhabitants of Puerto Rico (see 39 Stat. 953) and provided them with a bill of rights (see 39 Stat. 951-952). Although the governor, attorney general, commissioner of education, an auditor, and the justices of the Supreme Court remained presidential appointees (see 39 Stat. 955, 957, 965), the Jones Act made the legislature more representative by replacing the executive council with a popularly elected senate (see 39 Stat. 958-959). As under the Foraker Act, all laws enacted by the Puerto Rican legislature were reported to Congress for its approval. See 39 Stat. 961. The Jones Act repeated the command that "the statutory laws of the United States not locally inapplicable[] * * * shall have the same force and effect in Porto Rico as in the United States." 39 Stat. 954.

This Court in *People of Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937), noted the remarkable sweep of authority granted by Congress to the government of Puerto Rico in the Foraker Act and the Jones Act. "The aim of the Foraker Act and the [Jones] Act," the Court wrote, "was to give Puerto Rico full power of local self-determination with an autonomy similar to that of the states and incorporated territories. The effect was to confer upon the territory many of the attributes of quasi sovereignty possessed by the states—as, for example, immunity from suit without

their consent." *Id.* at 261-262 (citations omitted). By these statutes, Congress gave Puerto Rico "the typical American governmental structure, consisting of the three independent departments—legislative, executive and judicial," and it created in Puerto Rico "[a] body politic—a commonwealth." *Id.* at 262 (quotations and citation omitted). The Foraker Act and the Jones Act together granted the government of Puerto Rico "[t]he power of taxation, the power to enact and enforce laws, and other characteristically governmental powers," and "so far as local matters are concerned, * * * legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures." *Ibid.*; accord *Gromer* v. *Standard Dredging Co.*, 224 U.S. 362, 370 (1912) ("The purpose of the act is to give local self-government, conferring an autonomy similar to that of the states and Territories").

Congress did not stop with the Jones Act. In 1947, it enacted the Elective Governor Act, 61 Stat. 770, which amended the Jones Act to provide for popular election, rather than presidential appointment, of Puerto Rico's governor (see 61 Stat. 770-771), and appointment by the governor of all executive department heads (see 61 Stat. 771). The house of representatives was given exclusive authority to impeach the governor, while the senate had the sole power to try all impeachments. See *ibid.* The Act further provided that "[t]he rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union." 61 Stat. 773. Thus, by 1947, the people of Puerto Rico were recognized as United States citizens with a government in all significant respects similar to that of a State.

2. These developments set the stage for enactment of the legislation specifically at issue in this case. Although Congress had granted increasing measures of autonomy to the inhabitants of Puerto Rico, it retained the prerogative to annul laws passed by the local legislature (see 39 Stat.

961)—a power fundamentally inconsistent with Puerto Rican self-government. "By 1950, however, pressures for greater autonomy led to congressional enactment of Pub. L. 600, which offered the people of Puerto Rico a compact whereby they might establish a government under their own constitution." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 671 (1974) (citation omitted).

Acknowledging that it had "progressively recognized the right of self-government of the people of Puerto Rico" and that "an increasingly large measure of self-government ha[d] been achieved," Congress finally provided a mechanism whereby the people of Puerto Rico could adopt their own constitution and form their own government. 64 Stat. 319 (1950). Public Law 600 proposed to repeal the structural provisions of the Jones Act—providing for an executive, a legislature, and territorial courts—and to replace those provisions with a new constitution to be adopted by the people of Puerto Rico. See 64 Stat. 319-320. The remaining provisions of the Jones Act would continue in effect as the PRFRA. See 64 Stat. 319.

By its own terms, Public Law 600 was not just another organic statute for Puerto Rico, a successor to the Foraker Act and the Jones Act. Rather, it was a statute "*in the nature of a compact*" agreed to by Congress and the people of Puerto Rico. 64 Stat. 319, codified at 48 U.S.C. § 731b (emphasis added). Unlike other statutes, this compact would not take effect until it was approved by *both* Congress *and* the people of Puerto Rico in a referendum. See 64 Stat. 319, codified at 48 U.S.C. §§ 731c, 731d. Indeed, "[t]he consent of Puerto Rico was a requisite to the effectiveness of the Act." *Mora* v. *Torres*, 113 F. Supp. 309, 315 (D.P.R. 1953).

Congress approved Public Law 600 in July 1950, and in June 1951 the people of Puerto Rico approved the terms of this compact in a referendum by a 3-to-1 margin. See Hon. Calvert Magruder, *The Commonwealth Status of*

Puerto Rico, 15 U. Pitt. L. Rev. 1, 9 (1953). Eight months later, a constitutional convention approved a draft constitution that expressly created a "commonwealth" with three branches of government operating under a bill of rights in significant respects identical to the United States Constitution. See *ibid.* In a resolution adopted at the constitutional convention, delegates expressed their understanding of the new political order they were creating: "Thus we attain the goal of complete self-government, the last vestiges of colonialism having disappeared in the principle of Compact, and we enter into an era of new developments in democratic civilization. Nothing can surpass in political dignity the principle of mutual consent and of compacts freely agreed upon." IV Diario de Sesiones de la Convención Constituyente de Puerto Rico 2409-2410 (1952); see also *Mora*, 113 F. Supp. at 317 (quoting Resolution No. 23).

After the people of Puerto Rico approved this new constitution in a referendum, President Truman submitted the charter to Congress for its approval. According to the President, congressional approval of the new constitution would vest "full authority and responsibility for local self-government" in the people of Puerto Rico. H.R. Rep. No. 1832, at 10 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1899, 1902. Congress gave its approval (see 66 Stat. 327), which the President described as the "culmination of a consistent policy of the United States to confer an ever-increasing measure of local self-government upon the people of Puerto Rico." *Liquilux Gas Servs. of Ponce, Inc.* v. *Tropical Gas Co.*, 303 F. Supp. 414, 418 (D.P.R. 1969).

With the adoption and ratification of the Puerto Rico Constitution, the United States acknowledged Puerto Rico's new status in the international community. In a 1953 memorandum, the United States advised the United Nations that it would no longer report statistical and technical information concerning conditions in Puerto Rico, because Puerto Rico had become a self-governing

territory. See Memorandum by the Government of the United States of America Concerning the Cessation of Transmission of Information Under Article 73(e) of the Charter With Regard to the Commonwealth of Puerto Rico (discussed in *Cordova & Simonpietri Ins. Agency Inc.* v. *Chase Manhattan Bank N.A.*, 649 F.2d 36, 40-41 (1st Cir. 1981) (Breyer, J.), and *Mora*, 113 F. Supp. at 318). The memorandum stated that "Congress has agreed that Puerto Rico shall have, under [its] Constitution, freedom from control or interference by Congress in respect of internal government and administration, subject only to compliance with applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by judicial decision." *Ibid.* (quoted in *Cordova*, 649 F.2d at 41 n.28).

President Kennedy echoed this theme in a 1961 memorandum addressed to executive department and agency heads: "The Commonwealth structure, and its relationship to the United States which is in the nature of a compact, provide for self-government in respect of internal affairs and administration, subject only to applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act, and the acts of Congress authorizing and approving the constitution." Memorandum for the Heads of the Executive Departments and Agencies, 26 Fed. Reg. 6695 (July 25, 1961). This memorandum further noted that the United Nations had "recognized that the people of the Commonwealth of Puerto Rico, exercising effectively the right of self-determination in a free and democratic way, had achieved a new constitutional status." *Ibid.*

The President, Congress, and the people of Puerto Rico all agreed that the compact fundamentally changed the nature of the relationship between Puerto Rico and the United States. "Whereas the power of the United States exercised over Puerto Rico previously had been based upon the force of conquest from Spain, the new political status

of the island within the American system rests upon the consent of its people." Magruder, *supra*, at 9. Moreover, this new relationship had legal consequences: "Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens." *Cordova*, 649 F.2d at 41 (Breyer, J.).

Puerto Rico's new status as a "commonwealth" created by "compact" with the United States not only changed the law governing the parties' relationship, but it also suggested a rough equality with the States. As this Court has noted, "the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Examining Bd. of Engineers, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 594 (1976); see also *Cordova*, 649 F.2d at 42 (noting the "general Congressional intent to grant Puerto Rico state-like autonomy"). "Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'" *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 8 (1982) (quoting *Calero-Toledo*, 416 U.S. at 673).

3. Under the compact, Puerto Rico ordinarily cannot be subject to greater federal statutory burdens than are applied to the States. The provisions of the Jones Act not superseded by the new Puerto Rican constitution became known as the PRFRA. See *Calero-Toledo*, 426 U.S. at 594. One such provision, codified at 48 U.S.C. § 734, states that "[t]he statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in

Puerto Rico as in the United States." A form of this provision has been in effect since the Foraker Act became law in 1900. See 31 Stat. 80 (§ 14 of the Foraker Act); 39 Stat. 954 (§ 9 of the Jones Act). Moreover, this Court has repeatedly cited Section 734 (or its predecessor provisions) in support of decisions applying federal statutes to Puerto Rico. See, *e.g.*, *American R.R. Co. of Porto Rico* v. *Didricksen*, 227 U.S. 145, 148-149 (1913) (Safety Appliance Act); *Kopel*, 211 U.S. at 473-476 (federal fugitive extradition statute); *Rodriguez* v. *United States*, 198 U.S. 156, 161-164 (1909) (federal statute governing composition of grand juries); *Crowley* v. *United States*, 194 U.S. 461, 467-469 (1904) (same); *cf. Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988) (citing Section 734 to support the proposition that "the test for federal pre-emption of the law of Puerto Rico at issue here is the same as the test under the Supremacy Clause for pre-emption of the law of a State").

Section 734 provides a "default rule" of equal treatment for Puerto Rico, subject only to exceptions expressly provided by Congress. *Jusino Mercado* v. *Commonwealth of Puerto Rico*, 214 F.3d 34, 42 (1st Cir. 2000). By its terms, Section 734 requires that federal statutes be given "the same force and effect" in Puerto Rico as in the States, "except as hereinbefore or hereinafter otherwise provided." Thus, equal treatment is presumed, and if Congress wishes to treat Puerto Rico differently than the States under a particular federal statute, it must "otherwise provide[ ]."

The FLSA not only fails to state an exception to the "default rule" of equal treatment; it expressly states the opposite. The FLSA defines the term "State" to include territories such as Puerto Rico. See 29 U.S.C. § 203(c). Where Congress intended to treat Puerto Rico differently, it enacted specific provisions to produce that result. For example, the FLSA makes a special provision for "home workers" in Puerto Rico (see *id.* § 206(a)(2)); provides special review procedures in Puerto Rico (see *id.* § 210);

and exempts Puerto Rico from certain substantive provisions (see *id.* § 213(f)). Thus, it was Congress' practice in the FLSA to treat Puerto Rico like the States except in specific circumstances where it expressly provided for different treatment.

For present purposes, it is significant that Congress treated Puerto Rico like the States, recognizing that this Court had already acknowledged Puerto Rico's sovereign immunity. See *Sancho* v. *Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939) ("Porto Rico cannot be sued without its consent"); *Rosaly y Castillo*, 227 U.S. at 273 (Puerto Rico "come[s] within the general rule exempting a government sovereign in its attributes from being sued without its consent"); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation its enacts"). Thus, when this Court held in *Employees of the Department of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), that the FLSA does not expose state agencies to private enforcement actions, Congress reasonably understood that holding to apply equally to Puerto Rico. And when Congress amended the statute in 1974 to authorize private enforcement actions against "public agencies" including the governments of the States and territories such as Puerto Rico, it reasonably believed that it was abrogating the sovereign immunity of the States *and* Puerto Rico. See *Molina-Estrada* v. *Puerto Rico Hwy. Auth.*, 680 F.2d 841, 846 (1st Cir. 1982) ("There is no language, history, or purpose related to this statute suggesting that Congress intended Puerto Rico to be treated any differently from a state for purposes of determining the application" of the term "public agencies"). As this Court later held, however, Congress was mistaken about its authority to abrogate sovereign immunity in the FLSA. See *Alden*, 527 U.S. at 754; *Seminole Tribe*, 517 U.S. at 72-73.

Petitioner's argument assumes that the same Congress that defined the term "State" to include territories actually intended to *distinguish* the States from the territories. But the Court of Appeals properly rejected this argument, based on the definition of "State" in the FLSA and Congress' clear statement in the PRFRA that Puerto Rico must be treated equally with the States insofar as federal statutes are concerned.

As the Court of Appeals explained, this Court's decisions in *Seminole Tribe* and *Alden* mean that employees of State governments cannot sue their employers for violations of the FLSA. Pet. App. 5a-6a. In other words, Section 16(b) of the FLSA has *no* "force [or] effect" in the States, and "[t]he only way to give section 16(b) 'the same force and effect in Puerto Rico as in the United States' is to hold, * * * that Puerto Rico likewise enjoys immunity from private FLSA enforcement suits." Pet. App. 8a.

4. Petitioner's challenges to the decision below are unconvincing. *First*, she says the purpose of Section 734 was merely to make federal statutes "applicable in Puerto Rico." Pet. at 10-12. But the statute does more than declare the simple applicability of federal law; it commands that federal statutes apply in Puerto Rico with "the *same* force and effect" as in the States. (Emphasis added.) By its plain terms, Section 734 requires *equal treatment* of Puerto Rico and the States. Petitioner would rewrite the statute to say that federal statutes have *some* force and effect in Puerto Rico, regardless of their force or effect in the United States.[2]

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[2] Although Congress has enacted provisions similar to Section 734 for other territories—expressly making federal law applicable in the territories—none of those provisions requires that federal law have "the same force and effect" in the territory as in the United States. This fact only confirms this Court's observation that "Puerto Rico occupies a relationship to the

Second, petitioner says Congress plainly intended to subject Puerto Rico to suit under Section 16(b) of the FLSA because it specifically defined "State" to include territories. See Pet. at 13-15. That much is true, but only that much. Indeed, Congress plainly intended to subject Puerto Rico *and* the States to suit under Section 16(b). But this Court has held that Congress *could not* subject the States to suit under Section 16(b), and the question now is whether Congress would intend to subject Puerto Rico to the burden of private enforcement suits *when the States are not subject to the same burden.* Both the FLSA's definition of "State" and Section 734 of the PRFRA answer that question: Congress intends all federal statutes, including the FLSA, to have "the same force and effect" in Puerto Rico as in the States, absent a specific mandate for disparate treatment.

The decision below gives full "force and effect" to the plain language of Section 734. That decision is fully consistent with the expressed intention of Congress to give equal treatment, so far as federal statutes are concerned, to Puerto Rico as to the States. Petitioner has offered no convincing reason to disturb the Court of Appeals' ruling, and for that reason alone the petition should be denied.

II. The Decision Below Does Not Conflict With This Court's Decisions In Any Way.

The decision below is also fully consistent with this Court's decisions.

1. Within thirteen years after the organization of Puerto Rico under the Foraker Act, this Court stated that "[i]t [was] not open to controversy" that Puerto Rico enjoyed that immunity from suit that is the characteristic of a sovereign government. *Rosaly y Castillo*, 227 U.S. at 273. By 1937, this Court characterized the Foraker Act

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United States that has no parallel in our history." *Examining Bd.*, 426 U.S. at 596.

and the Jones Act as legislation designed to give Puerto Rico "an autonomy similar to that of the states." *Shell Co.*, 302 U.S. at 261-262. And after Congress entered into the compact with Puerto Rico in 1952, this Court again noted that Congress' design in its relationship with Puerto Rico was "to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Examining Bd.*, 426 U.S. at 594. These decisions reflect the unmistakable intention of Congress and the people of Puerto Rico, by their compact, to create a commonwealth that, "like a state, is an autonomous political entity, sovereign over matters not ruled by the Constitution." *Rodriguez*, 457 U.S. at 8 (quotations omitted).

The decision below thus comports with this Court's historic recognition of Puerto Rico's privileged position among American possessions. By giving full force and effect to the equal-treatment command in Section 734 of the PRFRA, the decision below treats Puerto Rico like a State for purposes of federal statutory law and ensures that Puerto Rico is not *disadvantaged* simply because of its unique status as a commonwealth.

2. Petitioner's contention that *Northern Insurance Co.* v. *Chatham County*, 126 S. Ct. 1689 (2006), requires a different result is unfounded. The Court in *Northern Insurance* held simply that a county government that was not an "arm of the State" for purposes of the Eleventh Amendment was not entitled to the State's immunity from suit in admiralty. See *id.* at 1695. *Northern Insurance* did not purport to address the issue decided by the Court of Appeals in this case, namely, the proper interpretation of the PRFRA. Moreover, in its examination of Eleventh Amendment immunity, *Northern Insurance* did not purport to address the sovereign immunity of Puerto Rico or other territories.

In short, the decision below does not conflict with *Northern Insurance* because *Northern Insurance* did not

address any of the issues actually decided by the Court of Appeals.

III. The Decision Below Does Not Conflict With Decisions From Other Circuits.

Nor does the decision below conflict with decisions in any other circuit. Petitioner concedes that the Court of Appeals "did not hold that Puerto Rico possesses Eleventh Amendment sovereign immunity." Pet. at 7. Indeed, the Court of Appeals rested its holding squarely on a plain-language interpretation of the FLSA and Section 734 of the PRFRA, not any examination of Puerto Rico's sovereign immunity *per se*. The decision below thus does not and cannot conflict with the decisions cited by petitioner, because those decisions address Eleventh Amendment immunity and do not purport to interpret the PRFRA.

1. That is true of the Ninth Circuit decisions cited by petitioner, which address the *constitutional* sovereign immunity of the Commonwealth of the Northern Mariana Islands ("CNMI"). In 1976, the Northern Mariana Islands and the United States entered into the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. See Pub. L. No. 94-241, 90 Stat. 263 (1976). In *Fleming* v. *Department of Public Safety*, 837 F.2d 401 (9th Cir. 1988), the Ninth Circuit held that the CNMI had *waived* whatever immunity it had when it entered into the Covenant. *Id.* at 407. While the Covenant expressly adopted several provisions of the United States Constitution—including the first nine amendments, the Reconstruction amendments, and the Nineteenth and Twenty-Sixth Amendments—noticeably absent from this list is the Eleventh Amendment. This omission made all the difference to the court in *Fleming*: "That [the drafters of the Covenant] deliberately declined to include the eleventh amendment unequivocally demonstrates their desire that the Commonwealth not be afforded eleventh

amendment immunity." *Id.* at 405. The Ninth Circuit reaffirmed this holding in *Magana* v. *CNMI*, 107 F.3d 1436 (9th Cir. 1997), and again in *Norita* v. *CNMI*, 331 F.3d 690 (9th Cir. 2003).

In each case, then, the issue was whether the CNMI had Eleventh Amendment immunity from suit in federal court, and in each case the Ninth Circuit held that the CNMI had waived its immunity by virtue of the specific language of the Covenant. By contrast, the PRFRA does not contain the same list of incorporated constitutional provisions that is found in the CNMI Covenant, and there is no suggestion here that Puerto Rico waived its sovereign immunity.

Moreover, of critical importance here, the court below, unlike the Ninth Circuit in these two decisions, did not even address Puerto Rico's immunity as a constitutional matter; its decision rested *solely* on statutory grounds. Thus, there is no conflict between the decision below and the Ninth Circuit decisions cited by petitioner.

2. The First Circuit decisions cited by petitioner likewise address Eleventh Amendment immunity rather than the PRFRA. As petitioner recognizes, an unbroken line of decisions from the First Circuit holds that Puerto Rico is treated like a State for purposes of the Eleventh Amendment. See, *e.g.*, *Ezratty* v. *Commonwealth*, 648 F.2d 770, 777 n.7 (1st Cir. 1981) (Breyer, J.) ("The principles of the Eleventh Amendment, which protect a state from suit without its consent, are fully applicable to the Commonwealth of Puerto Rico"); *Ramirez* v. *Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983) ("Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects"); *Metcalf & Eddy, Inc.* v. *Puerto Rico Aqueduct & Sewer Auth.*, 991 F.2d 935, 939 n.3 (1st Cir. 1993) ("We have consistently treated Puerto Rico as if it were a state for Eleventh Amendment purposes"); *Redondo Constr. Corp.* v. *Puerto Rico Hwy. & Transp. Auth.*, 357 F.3d 124, 125

n.1 (1st Cir. 2004) ("The Commonwealth of Puerto Rico is treated as a state for purposes of the Eleventh Amendment").

Clear as the First Circuit's position on the scope of constitutional protection for Puerto Rico, the Constitution was irrelevant to the analysis of the Court of Appeals here. The decision below rests on an interpretation of the PRFRA, not the Eleventh Amendment.

Moreover, by deciding the statutory question as it did, the court below *avoided* creating a conflict with the First Circuit. That court held in *Jusino Mercado* v. *Commonwealth of Puerto Rico*, 214 F.3d 34 (1st Cir. 2000), that Puerto Rico, like the States, is immune from private actions for damages under the FLSA. The plaintiff in *Jusino Mercado* made the same argument petitioner advances here—that this Court's decisions in *Seminole Tribe* and *Alden* distinguish Puerto Rico from the States with respect to sovereign immunity, so that even if Congress could not subject the States to suit under the FLSA, it could subject Puerto Rico to suit by the same statutory language. See *id.* at 37-39.

The First Circuit rejected this argument based on the text and structure of the FLSA, considered in conjunction with the policy of equal treatment expressed in the Federal Relations Act. The court first noted that "neither the language of the FLSA's enforcement provision nor the specific definitions provided by Congress suggest an intent to treat Puerto Rico and the states differently. To the contrary, Congress used the word 'state' in an encompassing sense, agglomerating the states and the territories." *Id.* at 42. Even when Congress amended the FLSA to authorize private actions against "public agencies," it did not make any attempt to distinguish Puerto Rico from the States. *Ibid.* "This is particularly significant," the First Circuit reasoned, "because other provisions of the FLSA show that when Congress intended to single out Puerto Rico, it knew how to do so." *Ibid.*

(citing provisions setting unique minimum wage requirements for "home workers" in Puerto Rico and establishing industry committees to set minimum wage rates for workers in Puerto Rico).

Most important, however, was the fact that "Congress wrote the FLSA's enforcement provision with full knowledge of Puerto Rico's unique commonwealth status." *Ibid.* Puerto Rico's unique status is reflected in the PRFRA, by which "Congress hoped 'to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union.'" *Ibid.* (quoting *Examining Bd.*, 426 U.S. at 594). Section 734 of the PRFRA demonstrated Congress' goal to grant Puerto Rico equal status, providing that federal statutes must have the same "force and effect" in Puerto Rico that they have in the States. "Thus, long before Congress enacted the relevant provision of the FLSA, it had put firmly in place a default rule: statutes of general application would apply equally to Puerto Rico and to the fifty States *unless* Congress made specific provision for differential treatment." *Ibid.*

Given this firm commitment to equal treatment for Puerto Rico, the First Circuit concluded that "courts will not ordinarily construe statutes to treat Puerto Rico in one way and the states in another unless the language of a particular statute demands that result." *Ibid.* The FLSA contains no express command to distinguish Puerto Rico from the States—indeed, it says the opposite—and the First Circuit found no compelling policy justification to do so. See 214 F.3d at 43. "[G]iven the language of the FLSA, the context in which Congress amended it to reach public agencies, and the guidance provided by the Federal Relations Act, reading the law to intrude more profoundly on Puerto Rico's sovereignty than on that of the states would contradict what we discern to be Congress's manifest intent." *Id.* at 44. Since the FLSA could not be

applied against the States, it could not be applied against Puerto Rico.[3]

Petitioner does not even cite *Jusino Mercado*—the only decision directly on point—despite the fact that the Court of Appeals expressly relied on that decision in interpreting the PRFRA. See Pet. App. 9a. This omission only highlights the futility of petitioner's attempt to create a circuit split where none exists.

* * * * *

The decision of the Court of Appeals vindicates the plain intention of Congress and the people of Puerto Rico to create a commonwealth that in many respects would be treated like a State. The decision below follows inexorably from the language of the FLSA—which defines "State" to include territories such as Puerto Rico—and the command of Section 734 of the PRFRA that federal statutes "shall have the same force and effect in Puerto Rico as in the United States." Neither the decisions of this Court nor the decisions of other courts of appeals suggest any error in the Court of Appeals' decision here. Further review is therefore unwarranted.

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[3] This result is consistent with the First Circuit's conclusion in *Molina-Estrada*, where then-Judge Breyer explained for a unanimous panel that "Congress, had it foreseen the *un*constitutionality of these words ['public agency'] (withdrawing their application to the states) would have intended withdrawal of their applicability *pro tanto* from Puerto Rico as well." 680 F.2d at 846. Thus, the court concluded, "as a matter of statutory construction, that the words 'public agency' no longer apply in Puerto Rico to the same extent that they no longer apply in the states." *Ibid.*

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted.

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